Ayer Itam Height Sdn Bhd & Ors v Chung Nyuk Sen @ Henry Chung

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-03(IM)-47 OF 2010
RAMLY ALI, AZHAR MA'AH AND ABDUL AZIZ ABDUL RAHIM JJCA
17 MAY 2012

Civil Procedure — Appeal — Appeal against decision of deputy registrar — Transfer of land — Claim for breach of deed and supplemental deed — High Court's order of payment on percentage of proceeds of sale of houses based on terms of deed and supplemental deed — Entitlement of assessment of damages outside deed and supplemental deed — Whether damages complied with deed — Whether damages assessed and awarded must be within limit of RM750,000 — Whether assessment of damages could be made based on court order — Whether award and quantum assessed by deputy registrar proper

In the High Court, the respondent claimed against the first appellant's breach of the deed and the supplemental deed. Under the said deed and the supplemental deed, in consideration of the transfer of a parcel of land by the respondent, the first appellant agreed to deliver a few properties in the development plan and certain percentage of the proceeds of sale of the houses in the said development plan to the respondent. This was prescribed by cl 3 of the deed read together with cl 1 of the supplemental deed. The High Court allowed the respondent's claim and made an order of payment on the percentage of the proceeds of the sale of the houses based on the terms of the deed and the supplemental deed. The learned deputy registrar made an order that damages be awarded in the sum of RM3,660,755.20 with costs to the respondent. The appellants contended that the respondent was not entitled to assessment of damages outside the deed and the supplemental deed; and that the respondent's damages must comply with cl 7 of the deed that the damages assessed and awarded must be within the limit of RM750,000. The respondent argued that the assessment of damages could be made based on the court order, and not to be limited under cl 7 of the deed and the supplemental deed; and that the award and quantum assessed by the learned deputy registrar was proper.

Held, allowing the appeal with costs:
The court order did not nullify any of the terms of the deed and the supplemental deed, particularly cl 7. The effect of the court order in allowing the percentage of the proceeds of the sale of the houses was just to reaffirm the terms of the deed and the supplemental deed in question. It did not nullify nor

vary the terms of the deed and the supplemental deed, including cl 7. Therefore, the remedy under cl 7 was still intact even after the court ordered that the respondent as the land owner shall have the option either to take back the said property and the title or subdivided titles or obtain payment of the sum of RM750,000 from the appellant, as the developer). The respondent chose the payment of money instead of taking back the property and the titles. Therefore, the payment of money must be within the amount stated in cl 7. The court order made no mention about cl 7. Therefore the terms of the deed and the supplemental deed including cl remained unchanged and was still enforceable (see paras 8–10).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, responden menuntut terhadap kemungkiran surat ikatan dan surat ikatan tambahan perayu pertama. Di bawah surat ikatan dan surat ikatan tambahan, sebagai balasan pindah milik sebidang tanah oleh responden, perayu pertama bersetuju untuk memberikan hartanah di dalam pelan pembangunan dan peratusan hasil jualan tertentu rumah-rumah di dalam pelan pembangunan tersebut kepada responden. Ini dinyatakan di dalam klausa 3 surat ikatan dibaca bersama dengan klausa 1 surat ikatan tambahan. Mahkamah Tinggi membenarkan tuntutan responden dan membuat perintah pembayaran ke atas peratusan hasil kutipan jualan rumah-rumah tersebut berdasarkan terma-terma surat ikatan dan surat ikatan tambahan. Timbalan pendaftar yang bijaksana membuat perintah bahawa ganti rugi diawardkan dalam jumlah RM3,660,755.20 dengan kos kepada responden. Perayu-perayu berhujah bahawa responden tidak berhak kepada penaksiran ganti rugi di luar surat ikatan dan surat ikatan tambahan; dan bahawa ganti rugi responden mesti mematuhi klausa 7 surat ikatan bahawa ganti rugi yang ditaksir dan diawardkan mesti dalam had RM750,000. Responden berhujah bahawa penaksiran ganti rugi boleh dibuat berdasarkan perintah mahkamah, dan tidak dihadkan di bawah klausa 7 surat ikatan dan surat ikatan tambahan; dan bahawa award dan kuantum yang ditaksirkan oleh timbalan pendaftar yang bijaksana adalah betul.

Diputuskan, membenarkan rayuan dengan kos:
Perintah mahkamah tidak membatalkan apa-apa terma-terma surat ikatan dan surat ikatan tambahan, terutamanya klausa 7. Kesan perintah mahkamah dalam membenarkan peratusan hasil jualan rumah-rumah adalah hanya untuk mengesahkan semula terma-terma surat ikatan dan surat ikatan tambahan yang dipersoalkan. Ia tidak membatalkan dan bukan juga mempelbagai terma-terma surat ikatan dan surat ikatan tambahan, termasuk klausa 7. Oleh itu, remedi di bawah klausa 7 masih tidak terjejas walaupun selepas mahkamah memerintahkan responden sebagai pemilik tanah akan mempunyai pilihan sama ada untuk mengambil balik hartanah tersebut dan hak milik atau hak milik yang dibahagikan atau memperolehi bayaran sejumlah RM750,000 daripada perayu, sebagai pemilik. Responden memilih bayaran wang tunai

daripada mengambil balik hartanah dan hak milik-hak milik tersebut. Oleh itu, bayaran wang tunai mesti dalam jumlah yang ditetapkan di dalam klausa 7. Perintah mahkamah tidak menyatakan mengenai klausa 7. Oleh itu terma-terma surat ikatan dan surat ikatan tambahan termasuk klausa, kekal tidak berubah dan masih berkuat kuasa (lihat perenggan 8–10).]

Notes

For cases on appeal against decision of deputy registrar, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 781–782.

Appeal from: Suit No S22–11 of 1989 (High Court, Sandakan)

Edwin Tsen (Tan Pang Tsen & Co) for the appellants.
Marina Tiu (Yap Chin & Tiu) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned judicial commissioner dated 25 January 2010 dismissing the appellant's appeal before him against the decision of the learned deputy registrar in assessing and awarding damages of RM3,660,775.20 with costs to the respondent.

FACTUAL BACKGROUND

[2] The respondent (the plaintiff at the court below) claimed against the appellants (the defendants the court below) jointly and severally for damages and interest for the first appellant's breach of the deed and the supplemental deed dated 28 July 1984, the performance of which were guaranteed by the second, third and fourth appellants.

[3] Under the said deed and the supplemental deed, the first appellant in consideration of the transfer of a parcel of land by the respondent to the first appellant, agreed to deliver to the respondent on or before 30 June 1986 together with occupation permits, a few properties in the development plan and certain percentage of the proceeds of sale of the houses in the said development plan. These are to be found under cl 3 of the deed read together with cl 1 of the supplemental deed.

[4] Clause 7 of the deed provides:

> 7. After final approval having been obtained for the development of Phase I project within the stipulated period if the Developer does not for whatsoever reasons commence or cause to be commenced construction work on the said property on or before the 30th day of June 1986 the Land Owner shall have the option forthwith

either to take back the said property and the title or subdivided titles in respect thereof or obtain the payment of the sum of Malaysian Ringgit Seven Hundred and Fifty Thousand (MR750,000.00) from the Developer. In such an event the Developer shall wherever applicable facilitate the expeditious return of the title or titles to the said property or re-transfer thereof if necessary and where money payment is claimed to expedite the payment of the same.

[5] The High Court allowed the respondent's claim and made an order of payment on the percentage of the proceeds of the sale of the houses based on the terms of the deed and the supplemental deed as claimed by the respondent. The learned deputy registrar was ordered to assess the amount of damages. The learned deputy registrar then proceeded to assess the damages as ordered and on 23 January 2009 he made an order that damages be awarded in the sum of RM3,660,755.20 with costs to the respondent.

[6] The appellants (as the defendants at the court below) contended that the respondent is not entitled to assessment of damages outside the deed and the supplemental deed; and that the respondent's damages (which was based on the deed and the supplemental deed) must be in compliance with cl 7 of the deed in question ie the damages assessed and awarded must be within the limit of RM750,000 as has been agreed by the parties.

[7] The respondent, on the other hand contended that the assessment of damages can be made based on the court order, and not to be limited under cl 7 of the deed and the supplemental deed; and that the award and quantum assessed by the learned deputy registrar is proper.

[8] We are of the view that the basis and the strength of the respondent's claim and the High Court order dated 19 March 1997 was based on the terms of the deed and the supplemental deed as agreed by the parties. The said court order did not nullify any of the terms of the deed and the supplemental deed, particularly cl 7 thereto. The effect of the court order in allowing the percentage of the proceeds of the sale of the houses is just to reaffirm the terms of the deed and the supplemental deed in question. It does not in any way nullified or varied the terms of the deed and the supplemental deed, including cl 7.

[9] That being the case, we are therefore of the view that the remedy under cl 7 still intact even after the court order ie the respondent as the land owner shall have the option either to take back the said property and the title or subdivided titles in respect thereof or obtain payment of the sum of RM750,000 from the appellant (as the developer). The respondent chose the payment of money instead of taking back the property and the titles. Therefore, the payment of money must be within the amount stated in cl 7.

[10] The court order made no mention about cl 7. Therefore the terms of the deed and the supplemental deed including cl 7 remained unchanged and still enforceable.

[11] Based on the above considerations we allowed the appeal and made an order that the order of the High Court must be read in line with cl 7 of the deed, ie whatever amount of the assessment of damages made by the deputy registrar, must be within the limit of RM750,000 as provided in the said cl 7. Learned counsel for the appellants had indicated that the appellants has no problem in making payment of the said amount of RM750,000 to the respondent.

[12] We allow the appeal with costs of RM10,000 to the appellants; and the deposit be refunded to the appellants.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor